Supreme Court, U. S.
FILED
SEP 27 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1270

EUGENE C. KELLEY,
Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Respondent.

PETITIONER'S REPLY BRIEF

R. J. ENGEL,
LAW OFFICE
ENGEL & WARNER,
A PROFESSIONAL CORPORATION,
55 Stevenson Street,
San Francisco, California 94105.
Telephone: (415) 392-5520.
Attorneys for Petitioner.

PERRAU-WALSH PRINTING CO. - 953 MISSION STREET - SAN FRANCISCO, CA. 94105

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PETITIONER'S REPLY BRIEF

I
RESPONDENT HAS FAILED TO ATTEMPT TO ARGUE THE ISSUE PRESENTED

Respondent Southern Pacific Company, in its brief, while repeatedly referring to the evidence, fails to mention *Federal Rule of Civil Procedure* §52(a), nor argue the uncontradicted fact that the District Court as well as counsel for both parties understood that a factual question was being presented and decided by the District Court.

Petitioner's Petition for Writ of Certiorari presented one issue, i.e., a factual question had been

decided by the District Court and the Ninth Circuit Court of Appeals, contrary to FRCP §52(a), exceeded its appellate review powers by refusing to recognize that "employee" status was a question of fact.

It seems incredulous to petitioner that despite this single issue being presented by the Petition for Writ of Certiorari, respondent Southern Pacific Company failed to make a single reference to why the Ninth Circuit Court of Appeals' decision was not in violation of FRCP §52(a).

It is clear that petitioner, under the Federal Employers Liability Act, is entitled as a matter of right to a trial by jury (*Schulz v. Pennsylvania Ry. Co.*, 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668). The record is clear that the right to a jury trial was recognized by the parties to this action and that by stipulation this right was partially waived regarding the limited factual issue of "employee" status (See Brief of Petitioner, Appendix A).

In those instances, when a party, who is entitled as a matter of right to a jury trial, waives that right, and submits factual questions to the Court, appellate review is restricted in the same manner as if that factual question had been decided by the jury (*United States v. Jefferson Electric,* 291 U.S. 386, 407, 54 S.Ct. 450, 78 L.Ed. 874; *Dooley v. Pease,* 180 U.S. 126, 131, 21 S.Ct. 329 45 L.Ed. 457).

While it is true that in suits in equity, a trial court's findings of fact are never conclusive (*United States v. U.S. Gypsum,* 333 U.S. 364, 395, n. 14, 68 S. Ct. 525, 92 L.Ed. 746); in actions at law, where a

party is entitled as a matter of right to a trial by jury, the party does not diminish or waive his rights granted pursuant to the Seventh Amendment of the United States Constitution by submitting a factual issue to the Court as opposed to a jury.

As this Court stated in *United States v. Jefferson Electric, supra,* the Court in such instances is exercising the function of a jury and its findings are on the same plane as if embodied in a jury's special verdict.

The attempt by respondent Southern Pacific Company to ignore this Court's mandate that determination of "employee" status under the Federal Employers Liability Act is a question of fact,[1] is an attempt to transform factual considerations into legal considerations which ultimately would result in unlimited appellate court power.[2]

It is submitted that the restrictions placed on appellate review both by the Seventh Amendment of the United States Constitution and *Federal Rules of Civil Procedure* §52(a) are of sufficient significance to warrant comment, not only by Respondent Southern Pacific Company, but also the Ninth Circuit Court of Appeals in those instances when the sole question presented on appellate review is the propriety of applying Rule 52(a) to an admittedly factual consideration.

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[1] *Baker v. Texas and Pacific Railroad,* 359 U.S. 227; *Ward v. Atlantic Coast Line,* 362 U.S. 396.

[2] See concerns expressed in *Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence,* 49 Virginia Law Review, 506, 537.

As set forth in Petitioner's opening brief,[3] the criticism of the Ninth Circuit Court of Appeals' decision, in the case at bar, is that it is the only decision which has reversed a District Court's finding of "employee" status under the Federal Employers Liability Act. Even the decisions which were erroneously relied on by the Ninth Circuit Court of Appeals were instances where the appellate court affirmed a District Court's factual conclusion regarding "employee" status. It is this very uniqueness of the Ninth Circuit Court of Appeals' decision in the case at bar that highlights the importance of requiring appellate compliance with the Seventh Amendment of the United States Constitution and §52(a) of the *Federal Rules of Civil Procedure.*

II

RESTATEMENT, AGENCY 2d, §220 DOES NOT CONTEMPLATE EXCLUSION OF ANY SPECIAL CLASS OF "EMPLOYEE"

Respondent Southern Pacific argues that this Court should recognize the right of respondent Southern Pacific Company to determine, itself, which individuals shall be covered by the Federal Employers Liability Act.

Petitioner has never claimed that the plain wording of the statute does not require "employee" status, nor that the legislative history does not confine the Act to "employees." Petitioner contends, however, that by allowing Respondent Southern Pacific Com-

[3]See Appendix B, Brief of Petitioner.

pany to determine who is an "employee" historically has not been the intention of this Court nor of the Legislature.

As this Court stated in *Baker v. Texas and Pacific Railroad Company, supra,* the Federal Employers Liability Act does not use the term "employee" in any special sense. That is to say that the rules and tests normally used to determine "employee" status are the same whether under the Federal Employers Liability Act or any other judicial determination.

Respondent Southern Pacific Company does not present this Court with any substantiation for a conclusion by this Court that "employee" status under the Federal Employers Liability Act was intended or should be entitled to a special judicial interpretation. Particularly does Respondent not provide this Court with any justification for concluding that the Legislature or this Court ever intended that "employee" status under the Federal Employers Liability Act shall be determined by the railroads for which the Federal Employers Liability Act was enacted specifically as a regulative statute to stand between the railroad and those individuals whose services they secure to perform railroad operational activities. This Court has long recognized that the Federal Employers Liability Act is remedial in nature and humanitarian legislation designed to give benefit to the individuals actually performing operational activities of the railroad as opposed to the railroad itself (*Urie v. Thompson,* 337 U.S. 163, 182, 69 S.Ct. 1018, 93 L.Ed. 1282 [1949]).

a) Legislative and Judicial History Does Not Exclude Plaintiff.

The logic offered by respondent Southern Pacific Company bears comment. Respondent offers a rather detailed analysis of the legislative history, suggesting that Congress did not intend coverage under the Federal Employers Liability Act to be extended to certain classes of individuals, specifically "teamsters."

Respondent concludes therefrom that so long as the railroad hires "teamsters" to perform railroad activities, then the individual performing said railroad activities is not entitled to the benefits of the Federal Employers Liability Act. Not because Congress did not intend to provide coverage to individuals who were performing those activities, but rather because respondent railroad company has developed a management decision to delegate responsibilities which are exclusively controlled and regulated by federal agencies and thus avoid its responsibilities under the FELA. Then in justification of this technique, designed to avoid such responsibilities, it attempts to convince this Court that its [respondent's] intentions are in some way the intentions of the Legislature as they existed in 1939.

Respondent does not provide this Court with any legislative history which justifies the conclusion that Congress in any way intended that a railroad company was authorized to develop managerial policies as a technique to avoid its responsibilities under the Federal Employers Liability Act. It is respectfully requested that this Court not sanction such a practice

which would allow individual railroad manipulation of a federal regulatory and humanitarian statute. The application of the Federal Employers Liability Act was intended by Congress to be applied uniformly to all railroads.

Furthermore, Respondent's references to the intention of Congress in passing amendments in 1939 to the Federal Employers Liability Act are misleading. The issue being considered by Congress at that time was whether to include under the Act express companies, freight forwarding companies, and sleeping car companies. That is to say, the Committee was considering whether express companies, freight forwarding companies and sleeping car companies should also be *liable* to their employees as railroads are liable to their employees.[4] Congress declined to expand the defendant class under FELA.

Respondent failed to include a portion of the proposed bill.[5] The original bill referred to by Respondent reads: "Every common carrier by railroad, including every express company, freight forwarding company, and sleeping car company engaged in commerce . . . shall be liable in damages. . . ."

The testimony referred to by Respondent would seem to be self-evident. Obviously, these companies in question did not desire to subject themselves to being liable to their employees under Federal Employers Liability Act. Their desires are quite similar

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[4]See: *Hearings, Senate Committee on the Judiciary*, 76th Congress, First Session, 1939.

[5]See Brief for Respondent, Page 16.

to those expressed by Respondent in the case at bar. Respondent also wishes it was not subject to the Federal Employers Liability Act.

Respondent has provided this Court with no authority for the proposition that Congress ever considered whether individuals who may ostensibly be employed by express companies of freight forwarding companies or sleeping car companies were to be excluded from the benefits of the Federal Employers Liability Act if they were *in fact* performing activities of the railroad and met appropriate legal tests as "employees" within the meaning of the Federal Employers Liability Act.

b) Baker v. Texas and Pacific Does Not Contemplate Exempting Any Special Class.

Respondent Southern Pacific Company contends that an exception to the application of *Restatement, Agency* 2d, §220 should be created. Namely, Respondent desires this Court to exempt from application of the *Restatement, Agency* 2d, §220 in determining "employee" status under the Federal Employers Liability Act *any* individual who is an employee of an agent of a railroad. It is Respondent's contention that an employee of an agent cannot as a matter of law meet the test set forth by this Court in *Baker v. Texas and Pacific Railway, supra;* and *Ward v. Atlantic Coast Line, supra.*

However, neither Respondent nor the Ninth Circuit Court of Appeals has provided this Court with either legislative history or judicial decision to support the

proposition, much less justify it, that any class of individual should be specifically exempt from the tests historically recognized by this Court in determining "employee" status.

Contrary to Respondent Southern Pacific Company's contention, this Court's decisions in *Baker v. Texas and Pacific Railway Co., supra,* and *Ward v. Atlantic Coast Line, supra,* do not extend the Act to "significant new groups." On the contrary, this Court specifically concluded that each case is to be governed by the relevant factors existing in that specific case. An injured individual cannot claim benefits under the Federal Employers Liability Act simply because he is a member of *any* specific group.

c) Doctrine of Borrowed Servant Is Not Applicable.

Likewise, Respondent, in a rather obvious misstatement of the law, characterizes this Court's two previous rulings in *Baker v. Texas and Pacific Railway Co., supra,* and *Ward v. Atlantic Coast Line, supra,* as applications of the "borrowed servant" concept of employment.[8]

For reasons best understood by Respondent Southern Pacific Company to have this Court limit the application of *Baker v. Texas and Pacific Railway Co.* to a concept of "borrowed servant", Respondent fails to supply this Court with any justification for recognizing such a limited construction. The factual conclusion of determining "employee" status under the

[8]See: Brief for Respondent, p. 14.

Federal Employers Liability Act is not synonymous with application of the borrowed servant doctrine.[7]

For purposes of the case at bar the limited construction sought by Respondent Southern Pacific Company is not material. The test for determining "employee" status pursuant to *Restatement, Agency* 2d, §220 and this Court's ruling in *Baker v. Texas and Pacific Railway Co., supra*, is the same test for determining "employee" status under the borrowed servant doctrine [see *Restatement, Agency* 2d, §227 (Comment a)].

Contrary to Respondent Southern Pacific Company's contention, Petitioner does not desire to expand the plaintiff's class beyond that specified in the statute, namely "employees" of a railroad. However, Petitioner does reject Respondent's attempt to restrict the already existing class of "employee" by: (1) refusing to comply with this Court's mandates set forth in *Baker v. Texas and Pacific Railway Co., supra*, that each case shall be determined on its individual facts as tested by application of *Restatement, Agency* 2d, §220; (2) by exempting from application of *Restatement, Agency* 2d, §220 all persons who are also employees of an agent of a railroad; (3) by concluding that railroads are not subject to the common law standard of determining "employee" status as set forth in *Restatement, Agency* 2d, §220, but rather are governed by a doctrine of "borrowed servant".

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[7] *Loaned Servant Doctrine Under Federal Employers Liability Or Safety Appliance Act*, 1 A.L.R.2d 302, n. 3.

III

SMITH v. NORFOLK AND WESTERN RAILWAY COMPANY IS CONSISTENT WITH SUPREME COURT OF THE UNITED STATES DECISIONS.

Respondent Southern Pacific Company contends that *Smith v. Norfolk and Western Railway Company* is an erroneous application of the standards set forth in *Restatement, Agency* 2d, §220.

Respondent ignores the fact that *Smith v. Norfolk and Western Railway Company* was an appeal from a denial of the railroad's motion for summary judgment. To begin with, *Smith v. Norfolk* then stands for the proposition that determination of "employee" status does present a question of fact to be decided by the jury and therefore the District Court properly denied the railroad's motion for summary judgment.

Secondly, *Smith v. Norfolk and Western Railway Company* stands for the proposition that the appellate court affirmed a District Court's judgment that sufficient factual bases existed to require the determination of "employee" status to be submitted to a jury.

Thirdly, *Smith v. Norfolk and Western Railway* specifically refused to decide whether the concepts of "agent" as promulgatel in *Sinkler v. Missouri Pacific Railway*, 356 U.S. 326, "extends" application of the Federal Employers Liability Act.

Rather, the Fourth Circuit decision, while *"supplementing"* the opinion of the District Court, singled out one of the appropriate factors set forth in

Restatement, Agency 2d, §220(h) as being particularly persuasive in justifying their conclusion that determination of "employee" status is a factual decision to be submitted for the jury's consideration.

This single factor which the Fourth District found particularly persuasive was "whether or not the work [being performed] is part of the regular business of the employer."

The Tenth Circuit recognizes that *Smith v. Norfolk and Western Railway Company* is not in conflict with decisions of the other circuits including that of the Ninth Circuit (See *Missouri-Kansas-Texas Railway Co. v. Hearson,* 10th Cir. (1970), 422 F.2d 1037, footnote 14).

It is submitted that Respondent Southern Pacific Company desires this Court to conclude that *Smith v. Norfolk and Western Railway Company* is not harmonious with the decisions in other circuits, not because this is a fact, but rather such an argument can be used as a vehicle to have this Court create exceptions for particular classes of individuals; classes to be chosen by Southern Pacific as being exempt from the benefits and protections of the Federal Employers Liability Act.

Contrary to Respondent Southern Pacific's suggested analysis of *Smith v. Norfolk and Western Railway Company,* the opinion is devoid of any reference that the District Court in *Smith v. Norfolk and Western Railway* relied on any standard other than that set forth in the *Restatement, Agency* 2d, §220.

Respondent Southern Pacific Company suggests to this Court that the use of the term "agent" is mutually exclusive to the use of the term "servant." The two terms are not mutually exclusive. *Restatement, Agency* 2d, §2 provides:

> "(2) A servant is an *agent* employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." (Emphasis added)

As the Fourth Circuit stated in *Smith v. Norfolk and Western,* 407 F.2d 501, 502:

> "It is enough here that under traditional agency tests the decision of the district court that the undisputed facts establish agency does not appear erroneous."

In contrast to the Fourth Circuit's recognition that the District Court's conclusion that there existed a factual question in determining "employee" status, the Ninth Circuit, in the case at bar, concluded to the contrary. In fact, as set forth above, the Ninth Circuit ignored that the determination of "employee" status was a factual question. *Smith v. Norfolk* is recognized as consistent.[3] The case at bar is admittedly not consistent and is uniquely the first case not to follow *Baker v. Texas and Pacific Ry. Co.*

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[3]See: *Missouri-Kansas-Texas Ry. Co. v. Hearson,* supra.

IV

THE DISTRICT COURT'S DECISION IN THE CASE AT BAR APPLIED THE CORRECT STANDARD FOR DETERMINING EMPLOYEE STATUS.

It is contended by Respondent Southern Pacific Company that the District Court adopted a special concept of employment for purposes of FELA.

To begin with, Respondent conveniently ignores the authority cited by the District Court to support its factual conclusions (Jt. App., 30). Respondent chooses to emphasize only one of the authorities relied on by the District Court and ignore the fact that the District Court understood its responsibilities well enough to single out the most appropriate authorities on the issue before it and exclude any irrelevant authorities. The Court specifically relied on *Baker v. Texas and Pacific Railway Co., Ward v. Atlantic Coast Line,* and *Restatement, Agency* 2d, §220, in addition to relying on *Smith v. Norfolk and Western Railway Co.*

Contrary to the Ninth Circuit Court of Appeals' decision and Respondent's assertions the District Court did not adopt a "special concept" of determining "employee" status under the FELA.

As set forth in Brief of Petitioner, pages 17-19, it was very clear not only to the District Court, but also to counsel for the respective parties, that the only question being submitted to the District Court for its consideration was a *factual* issue.

Thereafter, in its informal indication of its decision, the Court specifically relied on *Baker v. Texas*

and Pacific Railway Co. in commenting "that each case must be decided on its peculiar facts" and "no one feature of the relationship is determinative" (Jt. App. 152-153).

The Court then concluded that "on the facts presented and the record made in this case" the Court found that the:

> "work being performed by Eugene C. Kelley on July 3, 1963, was in fulfillment of a non-delegable duty of the railroad which brought him [Kelley] within the traditional agency relationship [to the railroad] as a matter of fact. . . ." (Jt. App. 152-153).

Both *Restatement, Agency* 2d, §§220 and 2 provide, in defining a servant, that he is a person employed to perform services in the affairs of another and is subject to the other's *right* to control. *Restatement, Agency* 2d, §2 specifically refers to the servant as an "agent" employed by a master.

Thus the interchangeable use of the term servant and agent is not a "special concept" as contended by Respondent Southern Pacific Company.

The District Court then entered findings which were directly correlated with the factors specified in *Restatement, Agency* 2d, §220, Comment h. (See Brief of Petitioner, pages 25-27).

The District Court specifically found that the responsibility for immediate supervision and control was that of Southern Pacific Company (Findings of Fact VIII, Jt. App., 29). And further, the Court specifically found that the work being performed by

petitioner at the time of his injury was in fulfillment of the non-delegable duties [performing services in the affairs of another] of Respondent Southern Pacific Company and that in so doing, brought the plaintiff within such a relationship to defendant Southern Pacific Company as to be covered by the Federal Employers Liability Act (Findings of Fact IX, Jt. App., 30).

This Finding of Fact did not conclude that the Petitioner, Kelley, was in such a relationship to Pacific Motor Trucking Company as to bring Petitioner within the coverage of the Federal Employers Liability Act. On the contrary, the Court found that a relationship existed specifically between Petitioner and Respondent so as to bring Petitioner within the coverage of the Federal Employers Liability Act.

The Court went on, in its Conclusion of Law, to also find that Petitioner was in such a relationship "to Southern Pacific Company" as to be covered by the Federal Employers Liability Act (Conclusions of Law, I, Jt. App., 30).

It is difficult for Petitioner to understand how the Respondent Southern Pacific Company can conclude from the above that the District Court found the Petitioner in such a relationship to Pacific Motor Trucking Company as to bring Petitioner within coverage of the FELA. The conclusion that Petitioner was covered by the Federal Employers Liability Act was based on the Court's factual and legal conclusion that such a relationship existed between Petitioner and Respondent Southern Pacific Company. The District Court specifically did not base its factual and legal conclusions on a relationship that existed between Petitioner and Pacific Motor Trucking Company.

The Findings of Fact by the District Court relative to Pacific Motor Trucking Company supported conclusions that Pacific Motor Trucking Company was performing services in the affairs of Southern Pacific Company. However, the Court did not conclude that simply because an agency relationship existed between Southern Pacific Company and Pacific Motor Trucking Company that *ipso facto* all employees of Pacific Motor Trucking Company were "employees" of Southern Pacific Company for purposes of FELA.

If Respondent's contentions were correct the Findings of Fact would have simply provided that (1) Pacific Motor Trucking Company was the agent of Southern Pacific Company; (2) Kelley was the employee of Pacific Motor Trucking Company. The Conclusions of Law then would have been that Kelley is covered by the Federal Employers Liability Act. Such findings and conclusions were neither submitted by Petitioner nor drafted by the District Court.

Finding of Fact IX (Jt. App. 30) specifically found that the work being performed by Petitioner at the time of his injury was performance of services in the affairs of Southern Pacific Company (affairs which Southern Pacific Company may be able to delegate but not do so and escape responsibility). Further, that performance of this work

brought plaintiff into such a relationship with Southern Pacific Company as to be covered by the Federal Employers Liability Act.

It is respectfully submitted that these findings, both factually and legally, when compared with the requirements set forth in *Restatement, Agency* 2d, §220, Comment h, and, when bolstered by the authorities relied on by the District Court, clearly show that the District Court did not adopt a "special concept of employment".

On the contrary, the District Court used the traditional concepts of factually determining "employee" status and in so doing relied on the very two decisions of the United States Supreme Court which clearly set forth the appropriate legal standards in reaching such a factual conclusion.

V

ASSUMING ARGUENDO THE DISTRICT COURT APPLIED THE LEGAL THEORY ASSERTED BY RESPONDENT, SUCH A THEORY IS CORRECT. SOUTHERN PACIFIC IS LIABLE FOR INJURIES SUFFERED BY EMPLOYEES OF "AGENTS" PERFORMING OPERATIONS ACTIVITIES OF THE RAILROAD.

Contrary to the Ninth Circuit's decision and Respondent's contentions, Petitioner does not nor has Petitioner contended, nor did the District Court find, that simply because Petitioner was an employee of Pacific Motor Trucking Company he was entitled to the benefits of the Federal Employers Liability Act.

This argument has been promulgated by Southern Pacific Company both before the Ninth Circuit as well as this Court with perhaps the hope on the part of Southern Pacific Company to obtain a ruling from this Court which will restrict application of the Federal Employers Liability Act regardless of whether it is relevant to the issue at bar.

However, notwithstanding that Petitioner feels that Southern Pacific's contention is irrelevant, Petitioner does feel that Southern Pacific Company is inaccurate.

This Court has previously acknowledged that an individual employed by an "agent" of a railroad who was injured while performing operational activities of the railroad is entitled to coverage under the Federal Employers Liability Act (*Ward v. Atlantic Coast Line*, 362 U.S. 396 at 397).

In *Ward v. Atlantic Coast Line*, Petitioner contended that the Turpentine Company was the "agent" of the respondent railroad, as this Court had previously construed that term in *Sinkler v. Missouri Pacific Railroad Company*, 356 U.S. 326 and consequently that Petitioner was entitled to coverage under the Federal Employers Liability Act. This Court rejected Petitioner's contention on the basis that insufficient evidence justified submitting that issue to a jury; not because the theory wasn't viable but that not adequate proofs had been presented. In commenting on what adequate proof might justify submitting this legal theory for jury determination of the question of "agent" this Court stated:

> "This was not a situation, as in *Sinkler,* in which the railroad engaged an independent contractor to perform operational activities required to carry out the franchise."

Contrary to the proofs in *Ward v. Atlantic Coast Line Railroad Company, supra,* in the case at bar, the proofs are clear that Petitioner Kelley was in fact performing operational activities of Respondent Southern Pacific Railroad Company which were required to carry out the franchise of said railroad. Furthermore, the District Court specifically entered a finding which factually supports that conclusion (See Findings of Fact, IV, Jt. App. 29).

It is suggested that this Court's conclusion in *Ward v. Atlantic Coast Line, supra,* does not create a new class of plaintiff as contended by Respondent Southern Pacific Company. An individual who is employed by an "agent" of a railroad company *and* performing operational activities required by the franchise of that railroad *at the time of his injury* is simply an individual who clearly meets the requirements of *Restatement, Agency* 2d, § 220 as being an "employee" of the railroad while he was performing the activities in question.

Contrary to the suggestion of Respondent Southern Pacific Company, such a conclusion does not provide coverage to any and all individuals who are employed by an agent of the railroad company. The relationship of the agent to the railroad company is but another factor in determining whether or not the individual in performing his work is performing services "in the affairs of another". The fact that the work being performed by the agent and/or the "employee" is "operational activities required to carry out the franchise" of the railroad is simply a rather clear showing that the services being performed are, in fact, the affairs of another, i.e., the railroad.

This Court has long recognized that the real question presented in determining "employee" status under the Federal Employers Liability Act is, regardless of the technical distinction created by corporate management decisions, whether at the time the injury occurred the individual involved was performing work which can be fairly characterized as the operational activities of the railroad. In *Shenker v. Baltimore and Ohio Ry. Co.,* 374 U.S. 1, 11. This Court in commenting, in a non-common law analysis of FELA application and referring to the concept of "agent" as defined by this Court's earlier decision of *Sinkler v. Missouri Pacific Railroad Company, supra,* stated:

> "'it was the conception of this legislation [FELA] that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor.'
>
> "If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity."

This Court's acknowledgment in *Ward v. Atlantic Coast Line, supra,* of the special significance of activities which are the operational activity of the railroad is not uncommon in legal analysis. *Restatement, Agency* 2d, §214, Comment b, provides:

> *"Action illegal unless license:*
> When a license is required for the performance of acts, one having a license [respondent Southern Pacific Company] who delegates performance of the acts to another [Pacific Motor Trucking Company] is subject to liability for the negligence of the other. Thus, a trucking company doing an interstate business requiring a license is liable for the negligence of an independent contractor whom it employs to do some of the work."

In applying this same principle in the chapter dealing with a principal's liability to an employee or servant, the same conclusion is reached in *Restatement, Agency* 2d, §492.

Thus, the significant test whether determining the class of plaintiff (*Baker v. Texas and Pacific, supra, Ward v. Atlantic Coast Line, supra*) or the class of defendant (*Sinkler v. Missouri Pacific Railroad Company*) has centered on the nature of the work of the individual in question, whether he be the party injured or the party committing the injury, to the operation of the railroad defendant (*Linstead v. Chesapeake & Ohio* [1927]. 276 U.S. 28, 34). And this Court has consistently held that a railroad cannot obviate the duties it must bear under the Federal Employers Liability Act by shifting its railroad responsibilities

to a third party and thus avoid liability. Early in this Court's interpretations of "employee" status under a doctrine of loan servant, the same criteria was recognized by this Court as being critical (*Linstead v. Chesapeake & Ohio* [1927] 276 U.S. 28, 34; *Shenker v. Baltimore & Ohio Ry.* [1963] 374 U.S. 1, 11).

If an individual is injured while performing acts which are the operational activity of a railroad, which the railroad is required to carry out under its franchise, there would seem to be little doubt that the individual involved was injured while performing services in the affairs of the railroad company. It is just as clear, that in so doing the individual is subject to the railroad's right to control those activities.

Such a conclusion would seem to inevitably fit perfectly within the definition of a servant as defined by the *Restatement, Agency* 2d, §§220 and 2.

This Court has repeatedly recognized that modern concepts of corporate structure and specialization in labor skills is not justification for a railroad to use such modern day realities as devices to avoid its responsibilities under the Federal Employers Liability Act, particularly when at the same time it is quick to demand the benefits derived from its franchises and monopolistic position within our economic structure (*Linstead v. Chesapeake & Ohio* [1927] 276 U.S. 28, 34; *Seas Shipping v. Sieracki* [1946] 328 U.S. 85, 95-100; *Shenker v. Baltimore and Ohio Ry.* [1963] 374 U.S. 1, 11; *Sinkler v. Missouri Pacific Railroad* [1958] 356 U.S. 326, 330; *Baker v. Texas and Pacific*

Railroad Company [1959] 359 U.S. 227, 228; *Ward v. Atlantic Coast Line Railroad* [1960] 362 U.S. 396, 398-400).

Dated, San Francisco, California,
September 25, 1974

R. J. ENGEL,
LAW OFFICE
ENGEL & WARNER,
A PROFESSIONAL CORPORATION,
Attorneys for Petitioner.